Supreme Court, U.S
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92-1815

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES F. HEFTI and MARION HEFTI,
Petitioners,

vs.

KEVIN MCGRATH, Revenue Agent, Individually,
THOMAS WETTIG, Appeals Officer, Individually,
JAMES JEWIK, IRS Supervisor, Individually,
FRANK BRAFMAN, Chief Appeals Officer, Individually,
EDWARD BUSEKRUS and
JAMES KUTTEN, IRS Senior Attorney, Individually,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower courts impermissibly determined that Heftis' *Bivens* action failed to state a claim for which relief could be granted.

II. Whether the lower courts impermissibly determined that Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, was proper.

III. Whether the District Court erred in determining that the Heftis are collaterally estopped from asserting Fourth Amendment claims.

IV. Whether the District Court erred in failing to recuse per Heftis' motion filed September 8, 1988.

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CITATION TO OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeals for the Eighth Circuit is unpublished and is reproduced in the Appendix to this Petition for Writ of Certiorari.

JURISDICTION

Petitioners originally filed their petition in the United States District Court for the Eastern District of Missouri. The District Court has jurisdiction of this action under 28 U.S.C. §§1331 and

1343 and under the doctrine announced in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). After filing a first, second, and third amended petition, Defendants herein filed a motion to dismiss or, in the alternative, motion for summary judgment on January 17, 1992. On February 2, 1992, the Honorable George F. Gunn issued an order granting Defendants' Motion to Dismiss with prejudice and denying Defendants' Motion for Sanctions. On January 7, 1993, the United States Court of Appeals for the Eighth Circuit sustained the District Court's ruling. Petitioners' Motion for Rehearing en banc was filed on January 20, 1993, and the same was denied on February 15, 1993 (reproduced in Appendix).

Jurisdiction of this Honorable Court to review the judgment of the Eighth Circuit is invoked by Petitioners under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

The Heftis originally filed this case as a result of unconstitutional actions of certain overzealous IRS officials in their attempt to collect taxes for the years 1980, 1981, and 1982. During the years 1980 and 1985, various Defendants/Respondents conducted inspections of the Heftis' home prior to trial in the Tax Court on or about February 14, 1986, involving tax assessments against the Heftis. It is the Heftis' contention that the inspections and other contacts with the Defendants/Respondents amounted to a violation of their constitutional rights.

During the proceedings in the United States District Court, the Defendants/Respondents filed a motion to dismiss or, in the alternative, a motion for summary judgment alleging, in part, that Petitioners' case failed to state a claim on which relief could be granted, and that Petitioners were collaterally estopped from stating said claims. Said motion for dismissal or, in the alternative, motion for summary judgment was thereafter granted and the United States Court of Appeals affirmed the lower court's decision.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

I. This Honorable Court should grant this Petition for Writ of Certiorari because the decision affirmed below flatly contradicts this Honorable Court's holding in *Bivens v. Six Unknown Named Agents Federal Bureau of Narcotics*, 403 U.S. 388 (1971.)

II. This Honorable Court should grant this Petition for Writ of Certiorari because the decision affirmed below flatly contradicts this Honorable Court's holding in *Lujan, Secretary of the Interior, et al., v. National Wildlife Federation, et al.*, 497 U.S. 871 (1990), as well as *Haines v. Kerner*, 404 U.S. 519 (1972).

III. This Honorable Court should grant this Petition for Writ of Certiorari because the decision affirmed below flatly contradicts the Court's holding in *Goodson v. McDonough Power Equipment, Inc.*, (1983) 2 Ohio St. 3d 193, 2 Ohio B.R. 732, 443 N.E.2d 978.

IV. This Honorable Court should grant this Petition for Writ of Certiorari because the decision affirmed below flatly contradicts *U.S. v. Fiat Motors of North America, Inc.*, D.C. D.C. (1981) 512 F.Supp. 2471.

ARGUMENT

I. Whether the lower courts impermissibly determined that Heftis' *Bivens* action failed to state a claim for which relief could be granted.

Petitioners contend that the lower court erred in dismissing Petitioners' Fourth Amendment *Bivens* action, for failure to state a claim for which relief could be granted.

In their third amended petition, Petitioners allege that Defendants violated their Fourth Amendment rights by repeatedly searching their home, exceeding the scope of the search, which, pursuant to Tax Court order, was limited to the business areas of

the home only, and by staging photos of the home by rearranging private areas to look like business areas. The District Court determined that these searches were consensual and, therefore, not illegal.

This Honorable Court has determined that one who demands admission under a claim of federal authority stands in a far different position than a private citizen asserting no authority other than his own. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 392. In such cases, a citizen has no other remedy than the judicial tribunals for rights which have been invaded by the officers of the government, professing to act in its name. Their alternative is that of resistance which may amount to a crime. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395.

In deciding the *Bivens* case, the Honorable Court specifically addressed the nature of searches carried out by federal authority and made specific restrictions on the use of that federal authority contravening the rights of ordinary citizens. It is unknown to Petitioners how three searches, of the same premises, are necessary and could be considered anything other than unreasonable. Therefore, it is Petitioners' contention that the District Court erred in dismissing this Fourth Amendment *Bivens* action, specifically in light of *Bivens v. Six Unknown Federal Narcotics Agents* which specifically restricts federal agents' overzealous and unconstitutional use of federal authority.

II. Whether the lower courts impermissibly determined that Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, was proper.

In granting Defendants' motion for dismissal or, in the alternative, motion for summary judgment, the lower court abused its authority.

This Court has ruled that pursuant to Rule 56 of the Federal Rules of Civil Procedure, subsection (c), an individual is entitled

to summary judgment in his favor if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). In the present action, no discovery was performed prior to the Defendants' motion for summary judgment. Therefore, no evidence, such as deposition testimony or interrogatory answers, was presented. In the instant case, the District Court ordered that all discovery be stayed pending the resolution of the immunity issues. In the District Court's memorandum of February 6, 1992, the District Court explicitly ruled in Plaintiffs' favor regarding the immunity issues. Therefore, sustaining Defendants' motion to dismiss was premature in light of the previous order of the Court and in light of *Haines v. Kerner*, 404 U.S. 519 (1972).

III. Whether the District Court erred in determining that the Heftis are collaterally estopped from asserting Fourth Amendment claims.

The District Court determined that the Heftis were collaterally estopped from relitigating the allegations in their Third Amended Complaint due to the Doctrine of Collateral Estoppel (Court Order and Memorandum, p. 13). The District Court based their reasoning on a Tax Court determination that the search described in Heftis' Third Amended Complaint is not subject to the exclusionary rule. However, in the case at bar, the burden that Heftis must prove is different than that in the Tax Court matter. In the instant case, the Heftis are not seeking to exclude the fruits of the search pursuant to the exclusionary rule, but instead show that the search was a violation of their Fourth Amendment rights and thus that the officials responsible for conducting the search should be liable in a civil action.

The Doctrine of Collateral Estoppel prevents issues actually litigated and determined by valid and final judgment from being

relitigated. *Federal Dept. Stores, Inc. v. Moitie*, 69 L.Ed.2d 103, 1981 - 1 CCH Trade Cases P64124; 101 S.Ct. 2424 (1981). However, the instant case is an exception to this doctrine. The Restatement Judgments, 2d §17, determines that parties are not precluded from relitigation of certain issues in the following circumstances: When the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issues in the initial action than in subsequent actions; or the adversary has a significantly heavier burden than he had in the first action; or because of potential adverse impact of the determination on the public interest or the interest of persons not themselves parties in the initial action. Am.Jur. 2d, Vol. 46, Judgments, citing Restatement & Judgments 2d §417.

In addition, in the Tax Court case, the primary issue at hand was income tax compliance, and whether the Heftis' deductions were proper. In the case at bar, the issue is a violation of the Heftis' constitutional rights by IRS officials. The Heftis are seeking damages for those violations. It has been determined that there is a due process prerequisite to the application of collateral estoppel requiring the asserting party to prove the issue was actually litigated, directly determined, and essential to judgment in the prior action. *Goodson v. McDonough Power Equipment, Inc.*, (1983) 2 Ohio St. 3d 193, 2 Ohio B.R. 732, 443 N.E.2d 978. Furthermore, collaterally estopping a party from relitigating an issue previously decided against violates due process where it could not be foreseen that the issue would subsequently be used collaterally, and the party had little knowledge or incentive to litigate fully and vigorously in the first action. *Goodson v. McDonough Power Equipment Inc.*, supra.

Again, in the prior Tax Court case, Heftis' goal was to exclude the evidence produced as a result of the search rather than to prove, according to civil law standards, that their Fourth Amendment rights were violated.

Therefore, in the case at bar, the Heftis should not be collaterally estopped from reasserting issues of Fourth Amendment violations. Again, Heftis are not seeking to have any evidence excluded for the purpose of determining income tax compliance. Furthermore, these present actions are not a review of income tax evasion issues.

Finally, there is a substantial public interest in prohibiting overzealous officials who have undertaken it upon themselves to breach the constitutional boundaries of unreasonable search and seizure.

IV. Whether the District Court erred in failing to recuse per Heftis' motion filed September 8, 1988.

On September 8, 1988, Heftis filed a motion to recuse pursuant to 28 U.S.C. §455. Under 28 U.S.C. §455, a judge *shall* disqualify himself in any proceeding in which his impartiality *might* be questioned (28 U.S.C. §455(a)). In addition, the statute requires that a judge *shall* disqualify himself where he has a personal knowledge of disputed evidentiary facts concerning the proceeding (28 U.S.C. §455(b)).

In the present case, the Heftis' motion sets forth various specific occurrences which would cause a reasonable person to doubt the judge's partiality. This judge had prior knowledge of the Heftis and was previously aware of their problems with the Tax Court. The standard for recusal is objective and the Court must disqualify itself if it concludes that a reasonable person would harbor doubts about the judge's impropriety. *United States v. Fiat Motors of North America, Inc.*, D.C. D.C. (1981), 512 F.Supp. 247. A judge should exercise his discretion in favor of disqualification if there is *any question* of impropriety. *Matter of Searches* conducted on March 5, 1980, D.C. Wis. 1980, 497 F.Supp. 1283.

In the case at bar, it is clear that the District Court erred in failing to recuse itself for bias and prior knowledge of facts. Therefore, the Heftis should be afforded relief from the final judgment dismissing the Heftis' case. *Liljeberg v. Health Services Acquisition Corp.*, La. 1988, 108 S.Ct. 2194, 486 U.S. 847, 100 L.Ed.2d 855.

CONCLUSION

WHEREFORE, for the reasons, law, equity, and other considerations presented, Petitioners pray that this Honorable Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,

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